Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. 160(c) From Application of Sections 251(c)(3), (4), and (6) in New-Build, Multi-Premises Developments	)	CC Docket No. 03-220

COMMENTS OF SBC COMMUNICATIONS INC.

SBC supports BellSouth's request that the Commission forbear from applying the Act's unbundling, resale, and collocation requirements[1] to facilities deployed to serve new build, multi- premises developments and to the services provided over such facilities to the residential and commercial end users located in such developments. The Commission should grant the relief requested by BellSouth for all ILECs.

The Commission should grant BellSouth's Petition for two fundamental reasons. First, as BellSouth sets forth in its petition, ILECs possess no inherent advantage over their competitors with respect to new build, multi-premises developments. Second, imposition of the Act's unbundling, resale and collocation requirements—and all of the regulations that attend those requirements—hinders an ILEC's ability to compete and undermines its incentive to bid in new build, multi-premises developments or to invest other than the bare minimum necessary to meet its carrier of last resort obligations for the

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[1] 47 U.S.C. §§ 251 (c)(3), (4), and (6)

customers of such developments. These two aspects of new build, multi-premises development situations demonstrate that the Act's forbearance requirements are fully satisfied. Moreover, because the same is true for all ILECs, the Commission should grant forbearance as to all ILECs.

As the Commission itself recently acknowledged in holding that competitive carriers are not impaired without access to fiber-to-the-premises ("FTTP") loops, ILECs and competitive carriers stand in the same shoes with respect to new build situations. Both face the same operational and economic barriers to deployment of new infrastructure – both must buy new plant, negotiate access to rights of way, obtain government permits, and hire skilled labor.[2] Indeed, as the Commission properly observed, competitive carriers may enjoy certain advantages over ILECs in deploying new plant, including lower labor costs (which make up the largest component of construction costs) and state-of-the-art back office systems.[3] In addition, the potential revenue opportunities from new builds are the same for both ILECs and competitive carriers.[4] Precisely because both ILECs and competitive carriers face the same risks and opportunities in new build situations, the Commission determined that ILECs should not have to unbundle FTTP. That same rationale relied on by the Commission in concluding that competitive carriers are not impaired without access to FTTP loops fully supports the

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[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, *et. al.,* CC Docket Nos. 01-338, *et, al.*, FCC 03-36 ¶¶ 240, 275 (Aug. 21, 2003)("Triennial Review Order").

[3] *Id.* ¶ 240.

[4] *Id.* ¶¶ 240, 274.

limited forbearance relief requested by BellSouth for new build, multi-premises developments.

As BellSouth demonstrates in its Petition, all competitors "stand on equal footing" with respect to new build, multi-premises developments.[5] The competitive situation is the same in SBC's service territories as BellSouth's service territories. Carriers negotiate with developers to provide telecommunications services in new build, multi-premises developments. Whether such negotiations occur in response to requests for proposals or in less formal situations, incumbency provides no intrinsic advantage in such negotiations. Rather, a developer seeks the best financial offer and the best commitment to provide services that the developer believes will benefit its development. Competitive carriers have precisely the same opportunity to meet those terms as ILECs. Any requirement that ILECs unbundle facilities, offer services for resale, or provide collocation for facilities deployed to serve new build, multi-premises developments thus runs squarely into the Commission's own conclusions with respect to new investment.[6]

The facts, moreover, demonstrate that competitive carriers face no greater obstacles than SBC, and, in fact, are successful in serving new build, multi-premises developments in SBC's service territories. SBC is aware of nearly 150 residential and commercial developments in its service territories, representing over 140,000 individual units, in which SBC is unable to provide retail telecommunications services because the developers have reached agreements with other competitive providers, typically facilities-

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[5] *BellSouth Petition* at 3.

[6] *Cf. Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 164 (D.C. Cir. 2002) (Commission may not in one proceeding "ignore[] the implications of its findings" in another proceeding).

based competitive carriers and cable companies. Such developments range from as small as five units in a development to as many as 10,000 units, and include both residential and commercial properties, such as residential subdivisions, shopping malls, hotels, apartment and condominium properties, and industrial parks. SBC is aware of hundreds of similar developments, representing hundreds of thousands of individual units, for which developers are negotiating service agreements.[7] In short, there is no doubt that in SBC's service territories competitive carriers face no greater risk in deploying facilities in new build, multi-premises developments than does SBC.

ILECs, however, currently are "unable to compete on an equal footing" with competitive carriers in such situations.[8] By having to lease their new plant to competitors at below cost rates, by being forced to resell their services at government mandated discounts, and by having to install additional equipment in their central offices to allow their competitors to collocate, ILECs are at a substantial disadvantage in negotiating with developers of new multi-premises properties. Indeed, as BellSouth discusses, competitive carriers face substantially less risk if they can rely on the incumbent to

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[7] Commercial multi-tenant environments and residential multiple dwelling units, in particular, represent substantial opportunities for competitive carriers as well as ILECs. With respect to MTEs, "According to the Building Office Management Association (BOMA), there are 760,000 multi-tenant commercial buildings [with] over 10,000 square feet in the United States. Small and medium-sized businesses are the primary tenants in these commercial buildings and account for 90% of all U.S. businesses or approximately 7.4 million units. These small and medium-sized businesses represent a majority of the annual $100+ billion communication services revenue in the U.S." www.rycom.ca/solutions/pdfs/tut/ brochure_Commercial_Markets.pdf. Similarly, with respect to MDUs, "approximately 30% of all US households live in residential MTUs. The Yankee Group estimates that the residential MTU market represents approximately a $20 billion annual revenue opportunity for service providers able to meet the needs of both consumers and property owners." www.rycom.ca/solutions/pdfs/tut/ brochure_Residential_Markets.pdf.

deploy facilities in a new build, multi-premises development and then, once the incumbent has incurred the risk of installing plant, avoid virtually any risk of their own by using the incumbent's network to deliver services to the end users in the development.[9] Application of the unbundling, resale, and collocation provisions of the Act thus undermine ILEC incentives to bid for new build multi-premises developments or to deploy any facilities other than those necessary to meet carrier of last resort obligations for the customers of such developments.

This "regulatory disparity," as BellSouth describes it,[10] warrants forbearance. Section 10 of the Act requires the Commission to forbear from applying any provision of section 251 or 271, as long as the Commission determines that such provision has been "fully implemented," and

- enforcement of the provision is not necessary to ensure that the charges, practices, classifications, or regulations of a telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- enforcement of the provision is not necessary for the protection of consumers; and
- forbearance from applying the provision is in the public interest.[11]

In this case, the equal standing of competitive carriers and ILECs in new build, multi-premises developments, coupled with the unequal risks fostered by the Act's unbundling, resale, and collocation requirements, obligate the Commission to forbear.

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[8] *BellSouth Petition* at 5.

[9] *Id.*

[10] *Id.* at 6.

[11] 47 U.S.C. §§ 160(d) and (a).

The equal ability of all carriers to compete in new development situations clearly demonstrates that enforcement of the Act's unbundling, resale, and collocation requirements is not necessary to (1) ensure that the charges, practices, classifications, or regulations of an ILEC are just and reasonable and not unjustly or unreasonably discriminatory, or (2) protect consumers. The Commission has repeatedly said that competition is the best mechanism for providing such consumer protections. Competition, not regulation, best ensures that consumers receive quality goods and services at reasonable prices. There is no need to layer any additional legal requirements—statutory or regulatory—in any situation in which competitive carriers and ILECs face equal opportunities to compete with one another.

Indeed, in any situation in which competitive carriers and ILECs face equal opportunities to compete, the continued imposition of forced regulatory mandates requiring ILECs to assist their competitors, such as unbundling of network elements, harms the public interest. Echoing Justice Breyer's concurring opinion in *Iowa Utilities Board,* the D.C. Circuit found, in no uncertain terms, that "*[e]ach unbundling of an element* imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."[12] The court held "nothing in the Act appears a license to the Commission to inflict on the economy [these costs] under conditions where it had no reason to think doing so would bring on a significant enhancement of competition."[13] The D.C. Circuit's reasoning applies with equal force to

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[12] *United States Telecom Assoc. v. FCC,* 290 F.3d, 415, 427 (D.C. Cir. 2002)(emphasis added)(citations omitted).

[13] *Id.* at 429.

resale, collocation, and all other requirements imposed on ILECs for the assistance of competitive carriers.

Continued mandatory imposition of such requirements in situations in which all carriers face equal opportunities to compete upsets the efficient societal balance of costs and benefits discussed by the D.C. Circuit in *USTA*. There is no basis, moreover, to subject ILECs to disparate regulatory treatment in situations in which they have no inherent advantage and in which all carriers face an equal opportunity to compete with one another. Doing so stifles the incentives for all competitors to bid for service in new build multi-premise developments and suppresses ILEC incentives to invest any more in its own network than is necessary to meet carrier of last resort obligations. It thus retards the central de-regulatory objective of the Act to promote facilities-based competition. The public interest requires that the Commission forbear from applying Sections 251(c)(3), (4), or (6) in new build, multi-premises developments.

Finally, forbearance is warranted in this circumstance because the requirements of section 251 have been fully implemented. SBC has now received section 271 approval throughout its service territories, and in each such approval, as part of its review of section 271's Competitive Checklist, the Commission found that SBC had "fully implemented" the unbundling, resale, and collocation requirements of the Act. Forbearance from those provisions is thus now permissible under section 10(d) of the Act. More fundamentally, the equal opportunity afforded by new build, multi-premises developments itself demonstrates that the requirements of section 251 are fully implemented in such situations. The purpose underlying section 251 is to allow for the

competitive provision of telecommunications services. That condition is intrinsic to new build, multi-premises developments, in which every carrier has the same opportunity to compete. Surely, whatever else "fully implemented" means, it must be the case that wherever all carriers have the same opportunity to compete, section 251 has been fully implemented.

CONCLUSION

For the foregoing reasons, SBC requests that the Commission grant BellSouth's Petition for Forbearance with respect to all ILECs.

Respectfully submitted,

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